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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT A. URCIUOLI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, under circumstances where state law permits state legislators to hold outside employment and, under certain defined circumstances, to vote on legislation or take other official action which affects the interests of their employers, compliance with the requirements of state law provides affirmative protection against prosecution and conviction for federal honest services fraud.

II. Whether Urciuoli had constitutionally adequate notice either through 18 U.S.C. §1346 or "the bribe-and-kickback core of the pre-*McNally* case law," *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896, 2931 (2010), that acting in conformity with state law regulating the conduct of legislators employed by private parties could nonetheless subject him to prosecution for federal honest services fraud.

III. Whether, under such circumstances, juries must be instructed regarding the relevant provisions of state law to define for the jury the parameters of the honest services owed by state legislators to the citizens they represent and to assist the jury in making the determination whether the defendant acted with the criminally culpable intent to commit bribery or instead intended to act in conformity with state law.

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The opinion of the First Circuit Court of Appeals is reported at 613 F.3d 11 (1st Cir. 2010). (A. 1a) The opinion of the First Circuit Court of Appeals in a prior appeal in this case is reported at 513 F.3d 290 (1st Cir. 2008). (A. 16a)

STATEMENT OF JURISDICTION

The judgment of the First Circuit was entered on July 20, 2010. (A. 38a) This Court has jurisdiction to review the judgment of the First Circuit on a writ of certiorari under 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

> in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. §1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom,

> any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1346:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

On January 5, 2006, Robert Urciuoli, CEO of Roger Williams Medical Center ("RWMC") in Providence, Rhode Island, was charged with conspiracy and substantive honest services mail fraud offenses in violation of 18 U.S.C. §§1341, 1346 in connection with his having arranged for John Celona, a Rhode Island state senator, to be hired as a consultant by an assisted living facility partly owned by an RWMC subsidiary. At the first trial of this case, the government relied on both a *quid pro quo* bribery theory and a concealed conflict of interest theory of honest services fraud. Urciuoli contended that he had acted in conformity with Rhode Island state law which expressly allows the state's part-time legislators to continue to participate and vote with respect to legislative matters which affect their employers to the same extent as all other employers falling within the same general category and that he did not act with fraudulent intent but instead acted in the good faith belief that the consulting contract with Celona was lawful under state law. Urciuoli requested that the jury be instructed regarding the relevant provisions of state law, but the district court declined to do so.

On appeal to the First Circuit, Urciuoli contended that the district court had erred in refusing to instruct the jury regarding Rhode Island state law and its centrality to the determination of what constitutes federal honest services fraud, that the district court's instructions regarding honest services fraud were unduly expansive, and that certain of the conduct on which the government relied fell outside the bounds of §1346. The First Circuit vacated Urciuoli's convictions on other

grounds and did not decide the state law issues. It did, however, discuss the issue, as it was certain to arise on retrial. The Court stated:

> The relationship between state law and the federal honest services statute is unsettled. The Fifth Circuit has held that section 1346 extends only to conduct that independently violates state law. . . . Other circuits have denied that state law plays any necessary role. . . . It is plain that sections 1341 and 1346 enact a federal crime – but beyond that, broad generalizations may be unsafe.
>
> Conceivably in some circumstances, state law might bear on what "services" are owed by a state legislator. But how far state law might be a premise for honest services fraud . . . *or, alternatively, might "immunize" conduct that could otherwise be a federal crime*, are tricky questions and may depend *inter alia* on precisely what the government has charged. The issue could be pertinent here *if* the government in this case had chosen to proceed on the theory that a conflict of interest alone (as opposed to a bribe or concealment of a conflict) was a basis for conviction.

(A. 32a-33a) (first emphasis added; second emphasis in original; citations and footnote omitted).

On retrial, the government, without doubt to avoid having the jury instructed with regard to the Rhode Island class exception and its central role in

the jury's determination whether Urciuoli had in fact committed federal honest services fraud, this time labeled its prosecution a *quid pro quo* bribery case. Urciuoli maintained, as he had from the outset, that he did not possess the criminal intent to defraud required for violations of §§1341, 1346 and that, in bringing about the consulting contract between Celona and the assisted living facility and in his dealings with Celona, he relied on the advice of counsel and on his knowledge of the Rhode Island class exception which permitted Celona to participate fully in legislative activities concerning general healthcare issues while being employed by an RWMC affiliate. To ensure that the jury could properly evaluate his defenses, Urciuoli requested that the jury be instructed with respect to the Rhode Island part-time legislator system and the provisions of the "class exception," contending that state law played a substantive role in defining the right of citizens of Rhode Island to the honest services of their legislators and that such instructions were critical to the jury's ability to fairly evaluate his intent.

With specific respect to the Rhode Island "class exception", Urciuoli requested that the jury be instructed as follows:

> Under certain circumstances, legislators can participate in legislation even though that legislation could affect the interests of the private entity for whom the legislator works. Specifically, Rhode Island state law contains a provision known as the class exception.
>
> This provision expressly permits a legislator to take action that would

affect a private entity for whom the legislator works as long as the legislation would affect that entity to no greater extent than any other similarly situated entities.

This is referred to as the class exception because it applies when proposed legislation treats a class of entities, such as all teachers or hospitals, alike.[1]

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[1] This is the requested instruction on which the First Circuit focused its opinion. Urciuoli also requested that the jury be instructed that:

> [i]n deciding whether a scheme targets the honest services due from a part-time legislator, you must consider the requirements of Rhode Island law. . . . In assessing whether the government has proven a scheme intended to deprive the public of the honest services of John Celona, you must consider whether the activity contemplated by the scheme is activity which is allowed under state law. If it is, you must conclude that the government has not proven its case, and you should return a verdict of not guilty.
>
> On the other hand, if you conclude that a defendant intended to do something which is not allowed under state law, then you must go on to assess whether the government has proven all of the other elements of mail fraud.

In addition, Urciuoli requested that the jury be instructed:

> First, you must determine whether a defendant may have acted in good faith because he or she believed the activities were allowed by state law. If the defendant may have acted in good faith, then the government will have failed

The district court initially appeared inclined to give the requested instructions, noting that this case was not a typical honest services fraud case:

> This is not the typical case. This is a case where the so-called bribe is the giving of a job. We've got plenty of evidence in the case relating to how that employment relationship affects what [Celona] can and cannot do as a legislator, so I think this case does require some explanation of the distinction between the two.

Tr. 2/19/08 (R436) at 15. The district court also expressed its belief that, despite the government's

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> to prove beyond a reasonable doubt that the defendant acted willfully and with the specific intent to defraud the public, which are both required to establish honest services mail fraud.
>
> Second, you must determine whether the government has proven that the object of a defendant's activities was in fact to deprive the public of the honest services of John Celona. In deciding this issue, you should consider the requirements of state law as they help define the honest services which are expected of a Rhode Island legislator.

The First Circuit indicated that it found Urciuoli's argument that the district court erred in declining to give these instructions "seemingly forfeited," because "his opening brief did not directly address" them, but went on to dismiss them for the same reasons it rejected the specific "class exception" instruction. (A. 9a) In fact, the arguments contained in Urciuoli's opening brief encompassed all the requested state law instructions equally. In any event, the instruction request which the First Circuit regarded as fully preserved suffices to raise all the issues addressed herein.

limitation of its theory of prosecution to *quid pro quo* bribery, the case it had tried was really a concealed conflict case. *See id.* at 43 (court tells government that "[y]ou may try to shoehorn this into a quid pro quo type theory, but the facts of this case simply aren't that clear-cut"); *id.* at 44 ("this [is a] really strange sort of case. In all honesty, I think this is a concealed conflict case. . . .This isn't a quid pro quo case"); *id.* at 45 ("I think we are in a very gray area"). Ultimately, however, the district court declined to give the requested instructions. The jury returned a verdict of guilty on all counts.

On appeal to the First Circuit, Urciuoli renewed his contention that the requested instructions regarding state law were critical both in defining for the jury the honest services owed by Rhode Island state legislators to the citizens of Rhode Island and in providing the jury with essential guidance in determining the pivotal question of whether Urciuoli acted with the requisite intent to defraud. During the pendency of Urciuoli's appeal, this Court decided *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896 (2010), in which it sharply circumscribed the boundaries of §1346 to reduce the statute to its pre-*McNally*[2] essence: "to preserve the statute without transgressing constitutional limitations, we now hold that §1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." *Id.* at 2931 (emphasis in original). Urciuoli filed a supplemental brief, urging that *Skilling*'s limitation of §1346 to "the bribe-and-kickback core of the pre-*McNally* case law" rendered the giving of the requested instructions regarding Rhode Island law even more critical, both to define

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[2] *McNally v. United States*, 483 U.S. 350 (1987).

the duty of honest services of Rhode Island's part-time legislators to the citizens of the state and to permit the jury to intelligently assess Urciuoli's intent.

Skilling's limitation of §1346 to the core pre-*McNally* bribery/kickback caselaw, Urciuoli contended, intensifies the need for juries to be provided with carefully delineated instructions, such as those which he requested, regarding what constitutes the "honest services" owed by the public official at issue, to ensure that the case does not stray beyond pre-*McNally* boundaries and result in the conviction of a defendant who had acted in full conformity with state law. He further contended that, even if consulting payments made under the circumstances present in this case could, *arguendo*, be found to be embraced within the core pre-*McNally* bribery caselaw, he could not be convicted of either conspiracy or substantive honest services fraud unless he *intended* to commit, or *intentionally* entered into a conspiratorial agreement to commit, bribery *falling within the compass of pre*-McNally *caselaw*, which, if his intent was to act in conformity with what was permitted under state law, he did not.

The First Circuit rejected Urciuoli's contentions regarding the need for the requested state law instructions. The Court held that the requested instructions were not necessary to the presentation of Urciuoli's good faith defense and "could have misled the jury into thinking the class exception could excuse bribery." (A. 9a)

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

Nothing in the long history of honest services fraud jurisprudence suggests that Congress intended, in enacting §1346, to override state law and extinguish the right of a state to define for itself the "honest services" owed by its legislators to its citizens. Interpreting §1346 to exclude state law considerations in defining the "intangible right" to "honest services" would superimpose upon the states a single generic ethical regime in violation of the basic principles of federalism. Such concerns underlay this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), refusing to "construe [§1341] in a manner that leaves its outer boundaries ambiguous and involves the federal government in setting standards of disclosure and good government for local and state officials." *Id.* at 360. *See Cleveland v. United States*, 531 U.S. 12, 27 (2000)("Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States"); *see also United States v. Bass*, 404 U.S. 336, 339 (1971)("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").[3] Such concerns

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[3] The Third Circuit relied on such federalism concerns in *United States v. Panarella*, 277 F.3d 678, 694 (3d Cir.), *cert. denied*, 537 U.S. 819 (2002), in concluding that state law provided the best limiting principle for "defining federal honest services fraud in close cases." *Id.* at 693-94. The Fifth Circuit's decision in *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir.)(*en banc*), *cert. denied*, 522 U.S. 1028 (1997), also relied on similar concerns:

are strongly implicated in cases such as this one, in which the regulation of the conduct of state legislators is a matter within the traditional competence of the states and in which Rhode Island has chosen to be governed by legislators who are permitted to participate in legislative matters of interest to their employers under certain defined circumstances.

The wisdom of Rhode Island's chosen system may well be questioned, and federal prosecutors may disapprove of the conflicts under which it expressly permits its part-time legislators to conduct their official acts and duties, but the fact remains that it provides normative standards against which Rhode Island citizens evaluate the propriety of their conduct with respect to their state legislators. It is a basic principle of our criminal justice system that "a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964).[4] Neither the

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> We find nothing to suggest that Congress was attempting in §1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services – to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure.

Id. at 734.

[4] *See also Sorich v. United States*, 129 S.Ct. 1308, 1310 (2009)(Scalia, J., dissenting from denial of certiorari)("It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail"); *Panarella*, 277 F.3d at 698 (noting that language in Court's prior honest services fraud opinions "do[es] little to allay fears that the federal fraud statutes give inadequate notice of

language of §1346 nor any judicial augmentation of it, either pre- or post-*McNally*, provided Urciuoli with clear notice, independent of his knowledge of state law, that he and RWMC were forbidden, at the peril of a federal criminal indictment, to employ Celona and to communicate their views to him.

Adding substantial weight to federalism and Fifth Amendment fair notice concerns are the critical First Amendment implications of regulating citizens' interactions with their elected representatives and thereby impacting their exercise of the fundamental right to "petition the Government for redress of grievance," a right protected by both the First Amendment and the Rhode Island Constitution, considerations which loom particularly large under circumstances where state law *allows* an employer to continue to "petition" its employee-legislator on matters affecting its interests.[5] There is an essential

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criminality and delegate to the judiciary impermissibly broad authority to delineate the contours of criminal liability"); *Brumley*, 116 F.3d at 745-46 (Jolly, J., dissenting)("The requirement imposed by the Supreme Court [in *McNally*] to speak more clearly was . . . for the benefit of the public, the average citizen, . . . who must be forewarned and given notice that certain conduct may subject him to federal prosecution").

[5] *See McCormick v. United States*, 500 U.S. 257 (1991)(Hobbs Act prosecution based on campaign contributions requires proof of explicit *quid pro quo*; "Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right'").

line to be drawn between employing a state legislator and continuing to address with him legislative matters of interest and bribing a state legislator with the corrupt intent to cause him to alter his official conduct in return, and state law has a crucial role to play in drawing that line.

II.

In *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896 (2010), the Court was confronted with a vagueness challenge to the constitutionality of 18 U.S.C. §1346, Congress' response to the Court's earlier opinion in *McNally v. United States*, 483 U.S. 350 (1987), which had eliminated deprivation of intangible rights, such as the right to honest services, from the reach of the federal mail and wire fraud statutes. Rather than invalidate the statute in its entirety, the Court sharply circumscribed its reach, limiting it to "*only* the bribe-and-kickback core of the pre-*McNally* case law." *Id.* at 2931 (emphasis in original). Cases falling within that "core" were those "involv[ing] fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." *Id.* at 2928. *See id.* at 2930 ("The 'vast majority' of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes"); *id.* at 2933 ("honest services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks"). If "[c]onfined to these paramount applications," the Court concluded, §1346 presented no vagueness problems.

Skilling's limitation of §1346 to "the bribe-and-kickback core of the pre-*McNally* case law"

defines not just the general type of cases which may be prosecuted under §1346 but also what conduct may properly be labeled "bribery," *i.e.*, that which is encompassed within the pre-*McNally* bribery/kickback core. *See Skilling*, 130 S.Ct. at 2933 (§1346's "prohibition on bribes and kickbacks draws content . . . from the pre-*McNally* caselaw"). Post-*Skilling*, it is not enough to simply apply the label "bribery" to payments made by a private party to a state legislator; instead, such payments must fall within the parameters of pre-*McNally* bribery cases.

In the years between the enactment of §1346 and this Court's decision in *Skilling*, the federal courts struggled to articulate coherent limiting principles to cabin the exceedingly broad scope of §1346, the "28 words" of which had "been invoked to impose criminal penalties upon a staggeringly broad swath of behavior." *Sorich v. United States*, 129 S.Ct. 1308, 1309 (2009)(Scalia, J., dissenting from denial of certiorari). One limiting principle which courts explored is the role of state law in defining the scope of public-sector honest services fraud. In *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir.)(*en banc*), *cert. denied*, 522 U.S. 1028 (1997), the Fifth Circuit held that state law defines the services which are owed by state employees: "the official must act or fail to act contrary to the requirements of his job under state law."[6] Other courts rejected state law as

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[6] Relatedly, the Third Circuit held in *Panarella*, 277 F.3d at 694, that "a public official who conceals a financial interest *in violation of state criminal law* while taking discretionary action that the official knows will directly benefit that interest commits honest services fraud" (emphasis added), but stopped short of holding that such a violation was *necessary* for a concealed conflict of interest to amount to honest services fraud. *Id.* at 699 n.9.

a limiting principle, for example, the Ninth Circuit in *United States v. Weyhrauch*, 548 F.3d 1237, 1245 & n.5 (9th Cir. 2008)(holding that government is not required to prove an independent violation of state law to sustain honest services fraud conviction, but expressly leaving open question of "what effect, if any, state law that expressly condones or excuses certain conduct would have"). This Court granted certiorari in *Weyhrauch* on the question "[w]hether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information . . . the government must prove that the defendant violated a disclosure duty imposed by state law." *Weyhrauch v. United States*, ___ U.S. ___, 129 S.Ct. 2863 (2009). The Court did not ultimately decide that question but instead remanded the case for further consideration in light of *Skilling*. *Weyhrauch v. United States*, ___ U.S. ___, 130 S.Ct. 2971 (2010).

This case presents to the Court related issues which are in some ways the other side of the *Weyhrauch* coin: the role of state law in defining what may and may not properly be prosecuted as federal honest services fraud, when a defendant's conformity with state law may preclude prosecution for federal honest services fraud, and the circumstances under which a defendant is entitled to have the jury instructed regarding provisions of state law which bear upon both the substantive "honest services" owed to the citizens of a state by its legislators and the jury's rational assessment of the defendant's intent. State law has a critical role to play in ensuring that §1346 remains cabined within the bounds set in *Skilling*, *i.e.*, in ensuring that prosecutions under the statute do not stray beyond

the parameters of the pre-*McNally* bribery/kickback core.

III.

The first critical function served by state law is in defining the scope of the honest services owed by the public official to the citizenry he or she serves. It is no answer to say, as the First Circuit did, that state law does not condone bribery. (*See* A. 7a) Of course it does not. It can, however, provide important guidance for the jury in its consideration whether the conduct which the government has labeled "bribery" was in fact criminally culpable pre-*McNally* bribery which may be punished federally under §1346.

Rhode Island has chosen a citizen-legislator system of governance in which its legislators devote only part-time to their legislative duties and of necessity generally hold outside employment, for which they are paid by their employers.[7] To address

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[7] Seventeen states have part-time legislatures in which state legislators devote only about half their time to their legislative duties and receive compensation which "is quite low and requires them to have other sources of income in order to make a living": Georgia, Idaho, Indiana, Kansas, Maine, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Utah, Vermont, West Virginia, and Wyoming. National Conference of State Legislatures, *Full and Part-Time Legislatures* (June, 2009), available at www.ncsl.org/?tabid=16701, last visited September 27, 2010. An additional 23 states have legislatures in which state legislators devote roughly two-thirds of their time to their legislative duties and receive an income for their legislative work which is "usually not enough to allow them to make a living without having other sources of income": Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Minnesota,

the potential conflicts of interest inherent in such a system and to guide its legislators and the citizens employing them, Rhode Island has by law defined the circumstances in which its legislators may and may not participate in or vote on legislation which will affect their employers and has made the decision that its legislators may participate in and vote on legislation which affects their employers if the impact which the legislation would have on their employers is no greater than that which it would have on other employers in the same category ("the class exception"). R.I.G.L. §36-14-7(b).[8]

Missouri, Nebraska, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Virginia, and Washington. *Id.*

[8] R.I.G.L. §36-14-7 provides:

> (a) A person subject to this code of ethics has an interest which is in substantial conflict with the proper discharge of his or her duties or employment in the public interest and of his or her responsibilities as prescribed in the laws of this state, if he or she has reason to believe or expect that he or she or any person within his or her family or any business associate, or any business by which the person is employed or which the person represents will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his or her official activity.
>
> (b) A person subject to this code of ethics does not have an interest which is in substantial conflict with the proper discharge of his or her duties in the public interest and of his or her responsibilities as prescribed by the laws of this state, if any benefit or detriment accrues to him or her or any person within his or her family or any business associate, or any business by which the person is employed or which the person represents, as a member of a business,

The Rhode Island system of governance, and the rules which it has chosen to govern the conduct of its legislators, form an indispensable part of how Rhode Island has chosen to define the "honest services" which a state legislator owes to the citizens of Rhode Island.[9] In some jurisdictions, a finding that the defendant had put a state legislator on the payroll would be tantamount to a finding of *quid pro quo* bribery, but not in Rhode Island and other states having comparable statutes. In Rhode Island, a legislator may accept a paycheck from his employer and proceed to advocate and vote in favor of legislation which will further the interests of the industry of which his employer is a part or, alternatively, seek to defeat legislation which will be

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> profession, occupation, or group, or of any significant and definable class of persons within the business, profession, occupation, or group, to no greater extent than any other similarly situated member of the business, profession, occupation, or group, or of the significant and definable class of persons within the business, profession, occupation or group.

[9] Some courts have indicated that state law may play a role in defining the duties owed by a fiduciary. *See, e.g., United States v. Segal*, 495 F.3d 826, 834-35 (7th Cir. 2007)("state laws are useful for defining the scope of fiduciary duties;" approving instruction which told jury that state law could be used to determine "the existence, the scope and the nature of the defendants' legal and fiduciary duties"), *cert. denied*, 553 U.S. 1006 (2008); *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003)(looking to both state and federal law for source of fiduciary duty); *United States v. McGeehan*, 584 F.3d 560 (3d Cir. 2009)(discussing *Murphy* and the role of state law); *see also United States v. Rezko*, 2007 WL 2904014 at *6 (N.D.Ill. October 2, 2007)(government contended that evidence of Illinois law was relevant "because [it] help[s] define the scope of [defendant's] duty of honest services under §1346").

uniformly detrimental to the category of employers to which his employer belongs, all without violating Rhode Island law so long as the required disclosures are filed.[10]

Because the combination of money paid to a legislator by an employer and legislative action by the employee-legislator which benefits his employer is not, in Rhode Island or other states with comparable statutes, *ipso facto quid pro quo* bribery, judicial guidance to the jury regarding how it is to draw the distinction between conduct which is permitted under state law – employment of a legislator who thereafter votes in favor of class-based legislation which will further the interests of his employer (or casts his vote against legislation which will harm those interests) – and conduct which is not – a quid pro quo exchange of money for the legislator's votes. Here, for example, Celona, the legislator whom Urciuoli was accused of bribing, could properly act with respect to any legislation which would have had an equal impact, for good or ill, on RWMC and other hospitals and health-care providers, and, critically, virtually all of the legislation with respect to which the government introduced evidence regarding Celona's actions fell into this general healthcare category. In cases such as this one, absent judicial guidance regarding the conduct permitted under state law, jurors are all too likely to believe that any time a legislator votes on a

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[10] Under Rhode Island law, it is the legislator, not the private party, who bears the responsibility for determining whether he has a conflict of interest and, if so, whether it requires him to recuse himself from participation with respect to the matter or simply to file a disclosure notice under R.I.G.L. §36-14-6.

matter that favorably affects the interests of his employer he violates his duty of honest services.

Under such circumstances, instructions regarding relevant state law are critical to counter the inevitable inference of wrongdoing which an uninformed jury would draw and to prevent the honest services fraud conviction of a defendant who has acted in full conformity with state law. An understanding of Rhode Island law and, particularly, the class exception, was essential to the jury's ability to distinguish between, on the one hand, lawful consulting payments paid to a state legislator by a private employer who continues to interact with the legislator on legislative matters, coupled with legislative action falling within the class exception, and, on the other hand, corrupt bribery for the purpose of influencing the legislator's official acts.

IV.

In cases such as this one, state law also has substantial bearing on whether the defendant/employer intended to cause the legislator/employee to deviate from the honest performance of his public duties and on whether the jury could rationally find that the payments made to the legislator were in fact intended as a bribe paid in exchange for favorable action by the legislator on legislation of interest to the employer or whether they were instead payments by an employer in intended conformity with state law. In this case, given the proof of Urciuoli's knowledge of the state law class exception and of his discussions with RWMC's counsel regarding what Celona could and could not permissibly do under state law, state law formed an integral component of Urciuoli's state of mind in his

hiring of Celona and his dealings with him thereafter. If, as state law provided a basis to do, Urciuoli believed that RWMC could employ Celona and that Celona could thereafter permissibly continue to vote on general healthcare matters that affected RWMC to the same degree as other healthcare providers and that, concomitantly, he could continue to interact with Celona with respect to RWMC's position on legislation, and conformed his conduct to the requirements of state law, then the jury could have found, had it had the necessary judicial guidance, that Urciuoli did not intend the consulting payments to Celona as a corrupt *quid pro quo* bribe in exchange for favorable legislative action.

In cases such as this one, which falls well outside the heartland of bribe-for-vote honest services fraud cases and for which there is no template to be found in the pre-*McNally* caselaw, it is essential that the jury be provided with the guidance it needs to be able to distinguish between acts which may appear to it unseemly and those which are in fact criminal under §1346, particularly where, as here, the jury is unlikely to be aware of the law which permits legislators to vote on matters affecting their employers and are, in fact, likely to assume without such guidance that such conduct is improper.[11]

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[11] The First Circuit, without discussing why such would be the case, concluded that the requested state law instructions could confuse the jury by suggesting that "the class exception could excuse bribery." (A. 9a) Such instructions would not, however, properly framed, have led to any such confusion. Instead, they would have told the jury that some conduct which jurors would likely intuitively regard as bribery may, in fact be consistent with an intent to act in conformity with state law,

Even if consulting payments made under the circumstances present in this case could arguably be found to be embraced within the core pre-*McNally* bribery caselaw, Urciuoli could not, in light of *Skilling*, be convicted of either conspiracy or substantive honest services fraud unless he *intended* to commit, or *intentionally* entered into a conspiratorial agreement to commit, bribery *falling within the compass of* pre-*McNally* caselaw. If his intent was to act in conformity with what was permitted under state law, he did not. The consulting payments to Celona may look like a form of bribery to those unfamiliar with the system of governance which Rhode Island has chosen, but whether they were bribery at all – and certainly whether they constituted "bribery" as reflected in pre-*McNally* caselaw – could not fairly be determined by the jury absent knowledge of what Rhode Island permitted its legislators to do in matters involving the interests of their employers, law on which private parties are entitled to rely in their dealings with state legislators.

A properly instructed jury could well have credited Urciuoli's defense that he did not intend to deprive the citizens of Rhode Island of Celona's honest services but instead to act in conformity with state law. The jury could, to be sure, have rejected the defense, but without the requested instructions, it could not, contrary to the conclusion of the First Circuit, *see* A. 8a-9a, even fairly consider it.[12] Absent

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leaving it for the jury to determine the intent with which Urciuoli acted.

[12] Absent instructions which told the jurors that they could consider Rhode Island law in assessing Urciuoli's intent and good faith, the jury was left without the *judicial* guidance necessary to fairly evaluate Urciuoli's defenses. *See United*

judicial guidance, the jury would have no idea how to evaluate the defense contentions or even whether they were permitted to consider such arguments at all in determining the critical issue of Urciuoli's intent.[13] The proffered instructions were a correct statement of state law essential to the jury's understanding of a principled theory of defense and amply warranted by the evidence in the case. Under the Due Process Clause of the Fifth Amendment, "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Matthews v. United States*, 485 U.S. 58, 63 (1988). *See United States v. Gamache*, 156 F.3d 1, 9 (1st Cir. 1998)("[a] criminal defendant is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it"). In the absence of the requested instructions, the jury was left unequipped to fairly assess Urciuoli's theory of defense, and Urciuoli did not receive a fair trial.

States v. Prigmore, 243 F.3d 1, 20-21 (1st Cir. 2001). Jurors may have heard the evidence, the defense arguments, and general instructions regarding the elements of honest services fraud, but they were not instructed that they could consider state law in deciding whether Urciuoli acted with the requisite corrupt intent.

[13] *See, e.g., United States v. Lake*, 472 F.3d 1247, 1263 (10th Cir. 2007)("When a defendant's defense is so dependent on an understanding of an applicable law, the court has a duty to instruct the jury on that law, rather than requiring the jury to decide whether to believe a witness on the subject or one of the attorneys presenting closing argument").

CONCLUSION

For all the foregoing reasons, Urciuoli's petition for a writ of certiorari to review the decision of the First Circuit in this case should be granted.

Respectfully submitted,

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Dated: October 12, 2010

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 09-1504

UNITED STATES OF AMERICA,
Appellee

v.

ROBERT A. URCIUOLI,
Defendant, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND
[Hon. Mary M. Lisi, U.S. District Judge]

Before
Boudin, Circuit Judge
Souter,* Associate Justice
and Howard, Circuit Judge

Martin G. Weinberg with whom Kimberly Homan was on brief for appellant.

Donald C. Lockhart, Assistant United States Attorney, with whom Luis M. Matos, Assistant United States Attorney, Dulce Donovan, Assistant

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* The Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

United States Attorney, and Peter F. Neronha, United States Attorney, were on brief for appellee.

July 20, 2010

BOUDIN, Circuit Judge. Robert Urciuoli, the former chief executive officer of Roger Williams Medical Center ("RWMC") in Providence, Rhode Island, seeks review of his conviction following his second trial for multiple counts of honest services mail fraud and conspiracy to commit such fraud.[1] He was convicted of the same offense in an earlier trial, but that conviction was vacated on appeal. *United States v. Urciuoli* (" *Urciuoli I* "), 513 F.3d 290, 300 (1st Cir.2008). *Urciuoli I* describes some background facts of this case, as well as the governing statute and case law.

The gravamen of the charge against Urciuoli was his role in a scheme to bribe-in the guise of an employment contract-John Celona, then a Rhode Island state senator. Insofar as Urciuoli challenges the sufficiency of the evidence, the facts are to be taken in the light most favorable to the jury's verdict. *United States v. Arroyo,* 546 F.3d 54, 55-56 (1st Cir.2008). The pertinent events and proceedings are as follows.

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[1] The mail fraud statute, 18 U.S.C. §1341 (2006), makes it a federal offense to use the mails in connection with a scheme to defraud and, after the Supreme Court declined to apply the statute in political corruption cases where no loss of money or property was proved, Congress amended the statute to include a scheme "to deprive another of the intangible right of honest services," *id.* § 1346. *See United States v. Sawyer* ("*Sawyer I* "), 85 F.3d 713, 723-24 (1st Cir.1996).

In the summer of 1997, Celona-after discussion with Urciuoli (CEO of RWMC) and Frances Driscoll (Senior Vice President of RWMC)-spoke and voted against overriding the Rhode Island governor's veto of a bill that (if passed) would make it hard for a for-profit entity to acquire a non-profit hospital. Urciuoli and Driscoll opposed the bill (and supported its veto) because it would prevent their desired sale of RWMC to another entity. Celona failed by two votes to sustain the veto, so the bill became law.

Immediately after this effort, Celona asked Urciuoli for employment, explaining that he was going through financial difficulties. In February 1998, Celona signed a contract purportedly employing him to market an RWMC-owned nursing home called Elmhurst Extended Care and an assisted living facility-the Village at Elmhurst ("the Village")-owned partly by an RWMC subsidiary and partly by a separate entity owned by a man named Peter Sangermano.

Although Celona did some marketing for the Village, his efforts were fairly modest and his compensation substantial. In the case that followed, the government charged that Urciuoli was in substance employing Celona to use his office on behalf of RWMC in two different respects:

- to support or oppose bills in accordance with RWMC's interest, including attempts to "kill" certain bills, and otherwise to promote RWMC's interests with respect to pending legislative matters;

- to conduct meetings at Celona's government office with Urciuoli and representatives of two major insurance companies in order to resolve longstanding disputes about reimbursements owed to RWMC.

Urciuoli, Driscoll, Sangermano and RWMC were indicted in the Rhode Island federal district court, and RWMC entered into a plea bargain but the three individual defendants went to trial. Although Sangermano was acquitted, Urciuoli and Driscoll were convicted on various counts of honest services mail fraud or aiding or abetting such fraud, 18 U.S.C. §§ 2, 1341, 1346, and-in Urciuoli's case-also conspiracy to commit honest services mail fraud, *id.* § 371.

Urciuoli and Driscoll appealed and we held that certain of the conduct presented to the jury in the first trial-namely, Urciuoli and Driscoll's role in Celona's lobbying of municipal officials to increase the number of patients brought to Roger Williams Hospital by ambulance-was not a crime under the honest services statute. *Urciuoli I,* 513 F.3d at 295-96. Because the jury instructions permitted conviction for such conduct and the jury might have convicted on that basis, a new trial was ordered. *Id.* at 297.

In the new trial, the government presented much of the evidence offered in the first trial, but Celona did not testify and this time the government limited its theory to quid pro quo bribery, eschewing any suggestion that-absent bribery-an undisclosed conflict of interest on Celona's part was sufficient, and avoiding reliance on Celona's lobbying relating

to the ambulance service. The theory thus fits within the Supreme Court's recent interpretation of the honest services provision in *Skilling v. United States*, --- U.S. ----, 130 S.Ct. 2896, --- L.Ed.2d ----, 2010 WL 2518587 (2010), a decision to which we will return in due course.

In the second trial, although Driscoll was acquitted, Urciuoli was convicted on the same counts as in the first trial: thirty-five substantive counts of honest services mail fraud (corresponding to each payment check mailed to Celona) and one conspiracy count. The district court denied Urciuoli's motion for judgment of acquittal and his motion for a new trial, and sentenced him to 36 months' imprisonment.

Urciuoli now appeals from his conviction on three grounds, and we begin with his claim that the evidence was insufficient to prove the crimes charged. Urciuoli says that the government failed to provide sufficient evidence to establish either the essential actus reus-an exchange of salary payments for Celona's legislative action or forbearance-or the required mens rea-Urciuoli's intent that the salary payments serve as a corrupt quid pro quo bribe.

The government's evidence permitted the jury to find that Celona's work for the Village was modest given his ample salary (roughly $260,000 total between February 1998 and January 2004); that his limited work for the Village decreased over the years while his contract was renewed and his weekly fee rose (on Urciuoli's orders) from $700 to $892 to $1000; that he reported more often to Driscoll and Urciuoli than to Village management; and that his salary was covered by RWMC and not the Village.

The jury could also find that Urciuoli hired Celona shortly after Celona had exerted legislative

efforts in RWMC's favor; that others at RWMC and the Village thought Celona lacked the skills for the purported marketing work; and that Urciuoli renewed Celona's contract and increased his pay shortly after Celona's effort to, in Urciuoli's words, "crank around"-that is, to exert pressure on-one of the insurance companies with whom RWMC was negotiating about reimbursement. Evidence further showed that Urciuoli sought to hide the extent of RWMC's relationship with Celona.[2]

From this and other evidence, a rational jury could find that Urciuoli's purpose was for Celona to use his office on behalf of RWMC and that Celona did so, that the compensation nominally for marketing was in reality for Celona's misuse of his powers, and that the result was a conspiracy to deprive Rhode Island citizens of Celona's honest services as a Rhode Island senator. Because various mailings occurred in implementing the scheme, those mailings triggered the mail fraud statute, which expressly extends to honest services fraud. *See* note 1, above. The inferred conspiracy between Urciuoli and Celona was also adequately proved.

Urciuoli's counter-arguments are not persuasive. That Celona performed some marketing services did not prevent the jury from regarding the payments as primarily intended by Urciuoli to secure Celona's legislative help. Nor does it matter whether Celona expressly agreed to help RWMC on

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[2] Urciuoli denied to police, the press, and RWMC's board that Celona had participated in certain of the insurance company negotiations and had lobbied for RWMC. Urciuoli also arranged for Celona's contract with the Village to state that the Village would compensate Celona when the reality was that Sangermano had insisted that RWMC reimburse the Village for that compensation and RWMC in fact did so.

specific bills, for the jury could infer an understanding that he provide RWMC general support in exchange for money (even if occasionally opposing RWMC).[3] Urciuoli was free to make such arguments to the jury, but the jury could fairly reject them.

At greater length, Urciuoli argues that the jury should have been instructed on the Rhode Island state law "class exception" and that Urciuoli should be granted a new trial for the court's failure to so instruct. The class exception is a Rhode Island statute declaring that a state legislator privately employed does not have a conflict of interest with his legislative duties if the benefit that accrues to his employer from his actions is no more than that obtained by other employers in the same class. R.I. Gen. Laws § 36-14-7(b) (2010).

Urciuoli argues, first, that concerns about federalism, fair notice, and the First Amendment right to petition the government require that state law be considered in determining the content of a state legislator's duties for which the failure to perform constitutes the deprivation of honest services under section 1346. But as we explained in *Urciuoli I*, "[n]othing in Rhode Island law purports to authorize or protect" quid pro quo bribery. 513 F.3d at 299; *see also* R.I. Gen. Laws §§ 11-7-3 to -4 (criminally prohibiting bribery of a state official). The class exception does not protect the conduct charged by the government.

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[3] *See United States v. Kincaid-Chauncey*, 556 F.3d 923, 943-47 (9th Cir.)(quid pro quo bribe need not be evidenced by any express agreement or statements of intent), *cert. denied*, 130 S.Ct. 795 (2009); *United States v. Kemp*, 500 F.3d 257, 284-85 (3d Cir. 2007)(same), *cert. denied*, 128 S.Ct. 1329 (2008).

The theory that non-disclosure of a conflict of interest was enough, even without a bribe, was advanced by the government in the first trial; but, stripping down its case, the government excluded any such theory from its opening argument, the revised indictment and its closing argument. And this time the jury instructions made it clear beyond peradventure that

> the Government must prove beyond a reasonable doubt that Defendant Urciuoli intended the payment to cause John Celona to alter his official acts, to change an official position that he would otherwise have taken or to take official actions that he would not have taken but for the payment

and that

> [t]he Government has charged honest services mail fraud based on a claim that John Celona was paid to perform certain official acts. Paying a legislator to perform political acts is not the same as employing a legislator in a job which creates a conflict of interest between the legislator's political duties and his employment.

Urciuoli claims that the class exception was still relevant to his defense that he (Urciuoli) acted in good faith because he knew of the class exception (through his attorney's advice and through a Rhode Island Ethics Commission opinion that his attorney procured shortly after Celona signed his employment contract with the Village). But Urciuoli had full

opportunity, which he used, to offer evidence of the opinion, the class exception and related testimony in support of his good faith claim.

The instruction Urciuoli sought stated in part that the class exception provision "expressly permits a legislator to take action on legislation that would affect a private entity for whom the legislator works as long as the legislation would affect that entity to no greater extent than any other similarly situated entities." This could easily have misled the jury into thinking the class exception could excuse bribery. It was also unnecessary to a fair presentation of Urciuoli's good faith defense. *United States v. Prigmore,* 243 F.3d 1, 17 (1st Cir.2001).

Urciuoli also argues that four other requested instructions on state law should have been given, but his opening brief did not directly address these instructions, instead merely citing them, so claims of error are seemingly forfeited. *Sandstrom v. ChemLawn Corp.,* 904 F.2d 83, 86 (1st Cir.1990). In any event, the same objection applies as to the class exception instruction already addressed: the instructions were not necessary to the defense and were quite likely to mislead the jury.

Finally, Urciuoli argues that Celona's facilitation of the insurance company meetings was not a misuse of his official powers and so was a legally insufficient basis for conviction. This very issue was addressed and decided adversely to Urciuoli in *Urciuoli I,* 513 F.3d at 296-97. But because the precise facts matter to the legal question and the evidence in the second trial differed from the first (mainly because Celona did not again testify), we revisit the issue briefly.

The second trial's evidence showed that Celona, at the time of the meetings, had become the chair of a committee with considerable power over health care legislation, and that both insurers-Blue Cross and United Healthcare ("United")-were regularly concerned with bills that were within the committee's purview. Looming in the background were proposed legislative changes on issues relevant to RWMC's disputes with the insurers: prompt reimbursement, "utilization review,"and the legal status of "most favored nation" contract clauses.

The implicit threat of legislative action was brought to bear by Celona, who personally arranged for four of the meetings (three for Blue Cross and one for United) to be held in his State House office with Celona present. Urciuoli's and Celona's communications reveal that Urciuoli knew of and requested these meetings and Celona's exertion of pressure on the insurers, and that Celona sought to advance RWMC's interests by his actions. Evidence also reflects that, on a couple of occasions, Celona resorted to direct pressure on the insurers as well.

So the jury could conclude, as we said before in *Urciuoli I,* that Celona was "misusing his official power over legislation-part of the honest services he owed to the citizens-to coerce Blue Cross and United into settlements with RWMC." 513 F.3d at 297. Legislators can and do convene meetings of constituents and seek to settle quarrels among them; but taking a bribe for the use of one's governmental power is a different matter and within the ambit of honest services fraud. Other precedent and

legislative history support our interpretation of the statute.[4]

What distinguishes this aspect of the case from some others is that the bribe was not for Celona to press or oppose legislation directly through his votes; rather, the purchased use of official power was the implied threat of such action-and also the potential use of influence over legislation in committee-that Celona conveyed largely by implication through the orchestrated meetings. But the distance between this and paying outright for legislative votes is not great: both involve the misuse of office.

Urciuoli insists that the fair warning required by due process principles, *Bouie v. City of Columbia*, 378 U.S. 347, 350, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), and rule of lenity, *United States v. Lanier*, 520 U.S. 259, 266-67, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), require that the concept of "honest services" be read more narrowly. Urciuoli's argument, however, rests primarily on generalities; nothing cited to us in the statute's language, history or case law suggests that the only honest services expected of a legislator are his or her casted votes. We made this clear in *Urciuoli I*. 513 F.3d at 294, 296-98.

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[4] *See United States v. Carbo*, 572 F.3d 112, 115 (3d Cir. 2009)("The most obvious form of honest services fraud is outright bribery of a public official."); H.R. 3050, 100th Cong. (1st Sess.1987) (earlier proposed bill to amend the mail fraud statute would have redefined "defraud" to include defrauding of citizens "of their right to have the public business conducted honestly ... *free from bribery*" (emphasis added)); *see also Urciuoli I*, 513 F.3d at 297.

Through an evolution endorsed by Congress, the mail and wire fraud statutes have assumed a role in policing corruption in state government, and federal prosecutors have been willing to test the limits. This court has sought to check perceived excesses in this case, *see Urciuoli I,* 513 F.3d at 294-96, and in others.[5] But the evidence here allowed the jury to find that the employment contract payments were a bribe by which Urciuoli sought the misuse of Celona's office, and there was no legal error.

Well after the argument in this case and shortly before this decision was ready to issue, the Supreme Court decided *Skilling.* Urciuoli then sought leave to file a supplemental brief which we granted and a 15 page brief has been filed arguing that *Skilling* helps Urciuoli's position. The government has offered to file its own brief, but this is unnecessary: *Skilling* is harmful to Urciuoli's position in certain respects and his attempt to use it in his favor, although imaginative, is hopeless.

Urciuoli's main use of *Skilling* is based on language in the opinion that he reads to narrow the mail fraud statute in honest services cases to cover only the party to a bribe who owes a fiduciary duty to the public (or some other entity entitled to honest services). *Skilling,* --- U.S. ----, at ----, 130 S.Ct. 2896, 2930-31, --- L.Ed.2d ----, at ----, 2010 WL 2518587, at *27 (noting that core honest service cases involve "offenders who, *in violation of a fiduciary duty,* participated in bribery or kickback schemes" (emphasis added)). Urciuoli owes no fiduciary duty

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[5] *E.g., United States v. Sawyer ("Sawyer II"),* 239 F.3d 31, 50 (1st Cir. 2001)(Boudin, J., concurring); *United States v. Czubinski,* 106 F.3d 1069, 1076-77 (1st Cir. 1997); *Sawyer I,* 85 F.3d at 722-34.

to the public, he argues, and so he cannot violate the mail fraud statute.

That Urciuoli did not make this argument in the district court is not necessarily fatal in a "change of law case" but we need not decide the procedural issue, for Urciuoli's reading of *Skilling* is wrong. Sections 1341 and 1346 by their terms cover anyone who engages in a "scheme" to deprive others of the intangible right to honest services. The courts, as we will see, have consistently construed "scheme" in this context to mean that those who bribe public officials take part in a scheme to deprive the public of the honest services of those they attempt to influence.

The sentence in *Skilling* relied upon by Urciuoli was merely identifying bribe and kickback cases as core honest services violations, distinguishing some less established scenarios to which some lower courts had extended the concept; nothing in *Skilling's* language or context suggests that the Court was distinguishing between the fiduciary who received the bribe and the non-fiduciary who gave it, a distinction that would conflict with the statute's language embracing those who participate in "any scheme ... to defraud." 18 U.S.C. § 1341; *see also* 18 U.S.C. § 2 (2006) (one who induces a federal crime is liable as a principal).

Indeed, of the nine circuit court cases that *Skilling* cites as exemplars of "core" honest service fraud cases, two involve convictions of individuals who bribed another to violate his fiduciary duties. --- U.S. ---- at ----, 130 S.Ct. 2896, 2930-30, --- L.Ed.2d ---- at ----, 2010 WL 2518587 at *27.[6] So, too, many of

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[6] *United States v. Mandel* involved the convictions of both the Governor of Maryland and the private individuals who bribed him. 591 F.2d 1347, 1359 n. 7 (4th Cir.1979). *Shushan v.*

the twenty-eight cases cited by the government to the Court, *e.g., United States v. Boffa,* 688 F.2d 919 (3d Cir.1982); *United States v. Lovett,* 811 F.2d 979 (7th Cir.1987), but we need not further gild the lily.

In the supplemental brief, Urciuoli invokes *Skilling* as he argues again that the government presented insufficient evidence to convict him of bribery. But the bribery theory is the only one pursued in the second trial here, the instructions conformed to it, and the evidence (as already noted) amply supported the jury's verdict. Urciuoli also reads Skilling as making state law relevant to defining honest services duties owed by a legislator but, however this may be, we have already explained that bribing a legislator is also unlawful under Rhode Island law.

Both claims-lack of evidence and reliance on state law-reflect Urciuoli's claim that he was not paying Celona for official services and that Celona's conflict of interest was not itself unlawful under Rhode Island law. But, as we have already noted above, the well organized instructions given by the district judge required the jury to find that Urciuoli "intended the payment to cause John Celona to alter his official acts, to change an official position which he would otherwise have taken, or to take official actions that he would not have taken but for the payments."

United States, one of the earliest honest services cases, held that "[a] scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would ... be a scheme to defraud the public." 117 F.2d 110, 115 (5th Cir.1941). *Skilling* also cited *United States v. Procter & Gamble Co.*, convicting a company that bribed employees of its competitor to divulge trade secrets. 47 F.Supp. 676, 678 (D.Mass.1942).

Other language in the instructions made clear that employment of Celona for other purposes, even if a conflict of interest was thereby created, was not the basis for the government's charge and that "[i]n order to prove honest services mail fraud the government must establish that the payments to John Celona were made with the specific purpose of influencing his actions on official matters." In short, this case is the core bribery offense preserved by Skilling.

Affirmed.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 07-1297

UNITED STATES OF AMERICA,
Appellee

v.

ROBERT A. URCIUOLI,
Defendant, Appellant

No. 07-1327

UNITED STATES OF AMERICA,
Appellee

v.

FRANCES P. DRISCOLL,
Defendant, Appellant

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND
[Hon. Ernest C. Torres, U.S. District Judge]

Before
Boudin, Chief Judge
Torruella, Circuit Judge
and Stahl, Senior Circuit Judge

Martin G. Weinberg with whom Kimberly Homan was on brief for appellant Robert A. Urciuoli.

John A. MacFadyen with whom B. Jean Rosiello and MacFadyen, Gescheidt & O'Brien were on brief for appellant Frances P. Driscoll.

Donald C. Lockhart, Assistant United States Attorney, with whom Robert Clark Corrente, United States Attorney, Luis M. Matos, First Assistant United States Attorney, and Dulce Donovan, Chief, Civil Division, were on consolidated brief for appellee.

January 18, 2008

Boudin, Chief Judge. Robert Urciuoli and Frances Driscoll, defendants in the district court and now appellants, served respectively as CEO and Senior Vice President of Rhode Island's Roger Williams Medical Center ("RWMC"). Its subsidiaries included Roger Williams Hospital; a nursing home known as Elmhurst Extended Care Facilities; and Roger Williams Realty, which half-owned an assisted living facility called the Village at Elmhurst ("the Village"). During a legislative battle in which RWMC had an interest, the two executives became acquainted with Rhode Island state senator John Celona.

In Rhode Island's "citizen legislature," legislators serve part-time, are modestly paid and ordinarily have other jobs. Celona operated a lawnmower business. The lawnmower business ran into trouble, and (during or just after the legislative battle affecting RWMC) Celona approached Urciuoli about obtaining employment at RWMC. Ultimately, in February 1998, Celona signed a contract, disclosed in public filings, that purported to employ him as a consultant to the Village.

Thereafter Celona did engage in some work on behalf of the Village (*e.g.*, making some referrals and highlighting the facility on his television program). But Celona also engaged in certain other activities between his hire in 1998 and the termination of the employment in early 2004. These activities, the subject of later criminal proceedings and this appeal, can be divided into three categories.

Celona communicated with Urciuoli and Driscoll about various pieces of legislation; defendants allegedly asked Celona to try to "kill" certain bills and otherwise to promote RWMC's interests with respect to pending legislative matters;

Celona lobbied a number of municipal officials (mayors and fire chiefs) in order to increase the number of patients brought to Roger Williams Hospital by ambulance service ("rescue runs"); and

Celona facilitated meetings at his government office between Urciuoli and representatives of two major insurance companies, pressing the parties to resolve longstanding disputes about reimbursements owed to RWMC.

Celona did not disclose in any of these instances that he was acting on behalf of RWMC or

its hospital. That alleged connection came to light after other, unrelated corruption charges involving Celona emerged.

Urciuoli, Driscoll, Peter Sangermano (the manager of the Village) and RWMC itself were thereafter indicted in the federal district court in Rhode Island on counts of conspiracy to commit "honest services" mail fraud and various counts of such mail fraud; 18 U.S.C. §§ 371, 1341, 1346 (2000). In substance, the government claimed that the executives had devised a scheme beginning in 1998, and ending in 2004, to offer Celona a disguised bribe in the form of a sham or largely sham job at one of RWMC's subsidiaries; in exchange, the government claimed, Celona advanced RWMC's financial interests by exploiting his public office in the three ways described above.

Celona pled guilty to mail fraud based in part on the conduct alleged. RWMC made its own plea bargain. The three remaining individual defendants went to trial. Each faced the conspiracy count and one or more mail fraud counts based on the premise of a single fraudulent scheme to deprive Rhode Island citizens of the honest services of Celona; individual mail fraud counts designated particular mailings as carrying out the scheme. Urciuoli was charged in most of these counts; Driscoll, who had left RWMC in 2000 and had nothing to do with the insurance phase of the case, was charged only in the conspiracy count and one of the substantive counts.

At trial, the prosecution contended that Celona's employment by the Village was a sham. It offered evidence that Celona's work for the Village was minimal given his ample salary ($700 per week at the start, and eventually as much as $1,000 per

week); that he reported to Urciuoli and Driscoll rather than to Village management; that his salary was covered by RWMC rather than the Village; and that his limited work for the Village decreased over the years. Celona was, on the prosecution's theory, being paid by RWMC for his influence on legislation, his lobbying of the mayors, and his pressuring of the insurance companies.

After deliberating for seven days, the jury found Urciuoli guilty on one count of conspiracy to commit mail fraud, 18 U.S.C. § 371, and on thirty-five counts of mail fraud, *id.* §§ 1341, 1346; Driscoll was convicted of a single count of mail fraud, on the theory that she aided and abetted Urciuoli. Sangermano was acquitted. Urciuoli was sentenced to 36 months in jail; Driscoll to 8 months in jail and 8 in home confinement. We stayed execution of the sentences pending these appeals.

The cloak of office instruction. On appeal, defendants do not dispute that the evidence was adequate to convict them of honest services mail fraud so far as the convictions may have rested on bribing Celona to influence legislation; but they say that the jury instructions wrongly allowed for conviction based on Celona's lobbying of mayors and his meetings with insurance companies, conduct that they claim does not constitute a federal crime.

This instruction issue, which we review *de novo, United States v. Woodward,* 149 F.3d 46, 68-69 (1st Cir.1998), *cert. denied,* 525 U.S. 1138, 119 S.Ct. 1026, 143 L.Ed.2d 37 (1999), turns on how broadly the statute should be read as to functions *other* than the enacting of legislation; closely related is the question whether the specific episodes in question (the lobbying of mayors and the insurance activities)

fall within the statute, also a legal issue open to *de novo* review. *Cf. United States v. Sawyer*, 85 F.3d 713, 726-27 (1st Cir.1996) (" *Sawyer I* "). Defendants did not seek a directed verdict as to these episodes, presumably because the indictment did not assign the disputed conduct to distinct counts but bundled it into a single overall scheme along with the alleged buying of Celona's influence on legislation.

The federal mail fraud statute, 18 U.S.C. § 1341, is built upon a single, archaic 204-word sentence which, reduced to its essence, makes it unlawful to use the mails in relation to "any scheme or artifice to defraud." The statute has undergone "repeated periods of rapid expansion and contraction." Coffee, *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am. Crim. L. Rev. 427, 427 (1998). Its application to political misconduct and corruption, as opposed to ordinary private fraud (*e.g.*, bank fraud, commercial scams), has been especially fraught.[1]

Notably, after the Supreme Court held the statute inapplicable to cases of political corruption that involve no loss of money or tangible property, *McNally v. United States*, 483 U.S. 350, 358-60, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), Congress overturned this construction by enacting section 1346; the new provision, passed with scant legislative history, defined the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest

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[1] Other federal statutes criminalize various corrupt practices-like the federal bribery and gratuity statutes, 18 U.S.C. §§ 201, 666-but these are limited in ways that section 1341 is not. *E.g., United States v. Sun Diamond Growers of Cal.*, 526 U.S. 398, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999).

services." 18 U.S.C. § 1346; *see Sawyer I,* 85 F.3d at 723-24. Prosecutors have sought to sweep much abusive political conduct within this proscription; in a number of cases courts have been more guarded.

The central problem is that the concept of "honest services" is vague and undefined by the statute. So, as one moves beyond core misconduct covered by the statute (*e.g.,* taking a bribe for a legislative vote), difficult questions arise in giving coherent content to the phrase through judicial glosses. Closely related concerns are assuring fair notice to those governed by the statute, *see Bouie v. City of Columbia,* 378 U.S. 347, 350, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), and cabining the statute-a serious crime with severe penalties-lest it embrace every kind of legal or ethical abuse remotely connected to the holding of a governmental position. *Sawyer I,* 85 F.3d at 725 (statute "does not encompass every instance of official misconduct that results in the official's personal gain"); *see also United States v. McNeive,* 536 F.2d 1245, 1252 (8th Cir.1976).

This court has wrestled with the statute in a number of cases. We have held that the obligations it imposes attach not only to formal official action like votes but also the informal exercise of influence on bills by a legislator, *United States v. Potter,* 463 F.3d 9, 18 (1st Cir.2006), and that it prohibits influence-buying short of formal bribes, *United States v. Sawyer,* 239 F.3d 31, 40 nn. 8-9 (1st Cir.2001) (" *Sawyer II* "); but our decisions also rejected a claim that the statute was violated merely by unlawful gratuities to a legislator, *Sawyer I,* 85 F.3d at 729, or by an IRS employee who accessed confidential computerized tax files for his own amusement and in violation of ordinary confidentiality restrictions,

United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir.1997). Although one might prefer a more clearly drafted statute, the Supreme Court has regularly used judicial glosses to clarify and focus language in criminal statutes of even greater complexity and breadth. *E.g., Reves v. Ernst & Young,* 507 U.S. 170, 177-79, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) (RICO).

The issue immediately before us concerns Celona's acceptance of undisclosed payments for two sets of activities. In the first, he contacted mayors and other local officials urging them to comply with Rhode Island law governing patient entitlement to be taken by ambulance to the hospital of the patient's choice. Apparently under Rhode Island law Celona could have done this openly for pay; but he did not disclose the private payment, he used official stationery for some of his communications, and those dealing with him knew he was a senator and had little reason to be aware of his private connection to RWMC itself.

In the second, Celona played a role-its extent is disputed-in summoning to meetings officials of Blue Cross/Blue Shield, which was at odds with RWMC on certain payment issues, and in urging them to come to terms. Some of the meetings were held on legislative premises, Celona was then head of a senate committee responsible for health legislation, and there was evidence that at one point Celona told a Blue Cross lobbyist that "unless [RWMC] is treated fairly, Blue Cross won't get treated fairly." Blue Cross was not told that Celona was being paid by RWMC. A second insurer, United Health, was similarly summoned but it came to terms with RWMC after only one meeting with Celona and a follow up contact by him.

Urciuoli effectively sought to rule both sets of episodes out of the case by asking the court to instruct the jury as follows: that to deprive Rhode Island citizens of Celona's honest services the object of the scheme had to be performance of his legislative duties; i.e., scheduling hearings, assigning bills to the hearing calendar and subsequent executive sessions, advocating bills at executive sessions, guiding and taking other action to advance bills through the Committee, and voting on legislation.

This proposed language, read in light of the examples given, comes close to restricting the statute to the enacting of legislation alone.

Although working and voting on legislation is the main official activity of a legislator and our earlier decisions refer to it constantly, it is not the only official function as to which "honest service" was owed by Celona as a senator. For example, a committee chair could hire incompetent assistants in exchange for kickbacks or divert public funds entrusted to him. Assuming other elements were present (*e.g.*, scienter, use of the mails), an honest services offense could be made out in those scenarios. So the proffered instruction was too narrow and was properly not given. *United States v. Prigmore*, 243 F.3d 1, 17 (1st Cir.2001).

The related and stronger claim is that, over defense objection, the court instructed the jury that the statute extended not only to formal exercises of official power (like voting) but also to any actions

done under the "cloak of office."[2] The "cloak of office" phrase is not inherently a novel or objectionable way of describing purportedly official action; but in this setting it permitted the jury readily to consider as potentially criminal conduct both Celona's approach of the mayors and his facilitation of the insurance meetings; if either set of activities was outside the reach of the statute, then the convictions are suspect.

We conclude for the reasons given below that the ambulance run advocacy with the mayors cannot qualify as a deprivation of the "honest services" owed to the public. Unlike most conduct typically the subject of the case law, urging local officials to obey state law is not easily described as a deprivation of honest services, actually or potentially harmful to the citizens of Rhode Island.[3] Unobvious harms are imaginable-as, for example, if Celona was pressing on mayors a dishonest interpretation of the law or false statistic-but the government has not made such

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[2] The jury was instructed as follows:

> "The honest services that an elected official owes to citizens is not limited to the official's formal votes on legislation. It includes the official's behind-the-scenes activities and influence in the legislation, and it also includes other actions that the official takes in an official capacity, not what he does as a private individual but what he does under the cloak of his office."

[3] Typical cases involve votes paid for by bribes or based on private undisclosed financial interests of the legislator, *United States v. Jennings*, 487 F.3d 564, 578-79 (8th Cir.2007), awarding of contracts based on bribes, *United States v. Kemp*, 500 F.3d 257, 265 (3d Cir.2007), and the filing of false financial disclosure forms or other non-disclosures in relation to official duties, *Woodward*, 149 F.3d at 62-63.

an argument and the instructions given did not impose such a limitation.

Nor was Celona's advocacy something for which payment would be inherently improper because it biased his judgment in making an official decision on a matter before him-for example, a bribe for a vote or a kickback for hiring an employee. Under Rhode Island law, apparently Celona as a part-time legislator could have been openly paid by RWMC to advocate with local officials. There is a state statute that prohibits government officials from accepting outside employment impairing "independence of judgment," R.I. Gen. Laws § 36-14-5 (1997), but this apparently is not taken to restrict legislators from private employment involving contact with courts or agencies.

The government says that a legislator's informal duties commonly extend to representing constituents with local officials and engaging in oversight functions and so to this extent should be regarded as official; but Celona's conduct falls in a borderland where analogies can easily be drawn both to public and private conduct and there is no indication that Celona invoked any purported oversight authority or threatened to use official powers in support of his advocacy. The government says the mayors can be affected by state legislation, but it did not show by context or threat that Celona sought deliberately to exploit this leverage.

Certainly his title and (possibly improper) use of senate letterhead assured him access and attention, *cf. Sawyer I*, 85 F.3d at 731 n.15; but his position guaranteed that in any event and its invisible force would have existed even if he emphasized that he was present solely as a paid

advocate. Indeed, even the legitimate work that Celona performed on behalf of the Village traded in part on the reputation, network and influence that comes with political office. That much is an unavoidable result of Rhode Island's decision to retain a system of government in which legislators hold outside employment without very stringent restrictions.

There is not very much direct precedent but in *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir.1978), *cert. denied*, 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979), the Eighth Circuit rejected a mail fraud count based on kickbacks paid to a state house speaker for merely recommending to other state officials, over whom the speaker had no authority, an architectural firm for work on state projects. *Rabbitt* was perhaps a close case,[4] but the explicit kickback scheme there involved was markedly more abusive than urging local mayors or fire chiefs to comply with state law. In all events, whether or not *Rabbitt* is correct, we think the rescue run lobbying of mayors was not a crime even if the facts are taken most favorably to the government.

By contrast, Celona's conduct vis a vis the insurers was closely related to his official functions including legislation. In March 2000, Celona told Driscoll that a proposed bill requiring payment of insurance reimbursements was being held up to see

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[4] Its reasoning was criticized by Judge Posner, *United States v. Holzer*, 816 F.2d 304, 309 (7th Cir.1987), and it is in tension with another Seventh Circuit case in which an aide to the mayor recommended awarding a contract to a company in which he held a concealed interest. *United States v. Bush*, 522 F.2d 641, 647-48 (7th Cir.1975), *cert. denied*, 424 U.S. 977, 96 S.Ct. 1484, 47 L.Ed.2d 748 (1976).

if a private resolution could be managed. When the dispute between RWMC and Blue Cross over bill payments developed in 2001 and 2002, Celona had become chair of a senate committee with considerable power over health care legislation, and both Blue Cross and United were regularly concerned with matters affected by the committee. Here, there is evidence that Urciuoli and Celona sought to exploit this connection to the legislative process.

At Urciuoli's behest, Celona became involved with negotiations between RWMC and the insurers, and he did so confessedly to bring pressure on the latter to settle on terms favorable to RWMC. As already recounted, the government offered evidence that Celona in a 2001 meeting with Urciuoli and a Blue Cross lobbyist delivered a barely veiled warning of potential legislative trouble to Blue Cross if it did not settle. When Celona later told Urciuoli that he had put considerable pressure on the lobbyist, Urciuoli replied approvingly that he deserved to be "cranked around."

In addition, Celona held two negotiating sessions in his state house office, one in 2002 and the other in 2003, which included Urciuoli and the Blue Cross CEO. In these meetings Celona could be seen as a committee chair hoping to resolve amicably a matter that might otherwise require legislation. The Blue Cross CEO testified at trial that without a compromise he expected that a "political solution [would be] thrust down our throats simply to save" RWMC. Urciuoli urges that the government has cobbled together unrelated incidents occurring over a period of several years; but the jury could easily view them as a deliberate scheme.

Some of the evidence was disputed, including the alleged veiled threat and the extent of Celona's active participation at the meetings. But considerable evidence, including the communications between Urciuoli and Celona, supported the government's view that, with active help from Celona, Urciuoli was deliberately seeking to invoke the threat of Celona's power over legislation. If the jury accepted the government's evidence, it is hard to see why the jury could not also conclude that Celona was misusing his official power over legislation-part of the honest services he owed to the citizens-to coerce Blue Cross and United into settlements with RWMC.

So we conclude that the instructions were over-broad insofar as they licensed the jury to consider the rescue run advocacy as a deprivation of honest services, but that the insurance episodes were properly considered as potentially criminal-as, needless to say, were Celona's actions in promoting or blocking legislation to favor RWMC. The latter alone, involving multiple episodes over a substantial period, probably would have assured conviction, at least or especially of Urciuoli. We have not described the latter in detail only because defendants do not contest the sufficiency of the evidence or deny that such activities would violate the statute.

Thus an argument could be made for regarding the jury's consideration of the ambulance run evidence as harmless in the sense that the convictions would arguably have occurred without it. But the ambulance evidence got a good deal of emphasis in the government's case in chief, and the government essentially concedes in its brief that the evidence should not be regarded as harmless if we conclude that the rescue run conduct could not

comprise a deprivation of honest services. Nor does it seek to distinguish between the two defendants even though their posture vis a vis the various sets of episodes is somewhat different and Driscoll's involvement more limited. Accordingly, a new trial is necessary.

On remand, an issue may remain as to the proper instructions relating to the insurance episode. On the government's version of what happened, Celona's action could be viewed as receipt of payment for misusing his powers as a legislator at Urciuoli's behest. But Urciuoli disputes some aspects of the government's version, and the possibility exists that the government may prove some but not all of the facts that it alleges, leaving the jury to determine whether the proven facts make out the offense.

Conceptually, the government's allegations may add up to bribery but the central wrong is not the usual problem of buying votes. The core misconduct, if it occurred, was paying Celona to use his legislative powers as a threat to extract favorable treatment for RWMC from the insurers. How this notion should be conveyed to the jury is a matter for the parties to propose and for the district judge to resolve in the first instance; but this is not a common subject of the honest services case law and some consideration might be given to helping the jury focus on the nature of the possible wrongdoing in relation to whatever facts it may find.

The government adds that Celona did not disclose to the insurers that he was being paid by RWMC, but while non-disclosure can *sometimes*

constitute an independent violation of the statute,[5] here the non-disclosure was in some sense a sideshow to the real harm-the use of legislative threats for private ends. Celona did not recommend specific terms of settlement under a pretense of neutrality, nor is it obvious why disclosure of Celona's relationship with RWMC would have resulted in less pressure on the insurance companies to settle. The government is free to develop such a theory on remand, but we think it unpromising.

State Law Instructions. Although we remand for a new trial, two separate claims of error could easily recur and so we address them as well. One relates to instructions as to the role of state law; the other, addressed in the next section, concerns the aiding and abetting instructions.

Urciuoli and Driscoll sought to argue in the district court that state law permitted Celona to vote on legislation affecting RWMC, despite his employment by a partly owned subsidiary of RWMC, so long as the legislation affected RWMC no more than any other hospital provider. R.I. Gen. Laws § 36-14-7. At trial they sought a jury instruction to that effect; the district court refused and instead charged that state law was irrelevant (except as it

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[5] The case law does establish that concealment of a material conflict of interest can under some circumstances constitute honest services fraud. *E.g., Jennings,* 487 F.3d at 579 (legislator voted on and authored legislation to aid company in which he had secret financial interest); *United States v. Panarella,* 277 F.3d 678, 691 (3d Cir.) (legislator lied on his financial disclosure forms while voting to benefit company that secretly employed him as a consultant), *cert. denied,* 537 U.S. 819, 123 S.Ct. 95, 154 L.Ed.2d 25 (2002); *Woodward,* 149 F.3d at 62 (legislator, in violation of state law, failed to disclose gratuities received from lobbyist).

might bear on intent). Objections were raised both to the refusal and to the instruction actually given.

The relationship between state law and the federal honest services statute is unsettled. The Fifth Circuit has held that section 1346 extends only to conduct that independently violates state law. *United States v. Brumley,* 116 F.3d 728 (5th Cir.) (en banc), *cert. denied,* 522 U.S. 1028, 118 S.Ct. 625, 139 L.Ed.2d 606 (1997). Other circuits have denied that state law plays any necessary role. *E.g., United States v. Margiotta,* 688 F.2d 108, 124 (2d Cir.1982) ("[A] violation of local law is not an essential element ...."), *cert. denied,* 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983); *United States v. Keane,* 522 F.2d 534, 545 (7th Cir.1975), *cert. denied,* 424 U.S. 976, 96 S.Ct. 1481, 47 L.Ed.2d 746 (1976). It is plain that sections 1341 and 1346 enact a federal crime-but beyond that, broad generalizations may be unsafe.

Conceivably in some circumstances, state law might bear on what "services" are owed by a state legislator. But just how far state law might be a premise for honest services fraud, *cf. Sawyer I,* 85 F.3d at 728, or, alternatively, might "immunize" conduct that would otherwise be a federal crime, are tricky questions and may depend *inter alia* on precisely what the government has charged.[6] The issue could be pertinent here *if* the government in this case had chosen to proceed on the theory that a

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[6] *See Sawyer II,* 239 F.3d at 42; *Sawyer I,* 85 F.3d at 728; *Woodward,* 149 F.3d at 62. *See generally* Brown, *Should Federalism Shield Corruption? Mail Fraud, State Law and Post-*Lopez *Analysis,* 82 Cornell L.Rev. 225 (1997). *Cf.* Fallon, Meltzer & Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 527-41 (5th ed.2003) (discussing the arguably analogous relationship between federal due process rights and state-created property and liberty interests).

conflict of interest alone (as opposed to a bribe or concealment of a conflict) was a basis for conviction.

But the government's position throughout was that Celona was being paid for performing official acts-specifically, that the case was one of quid pro quo bribery with payments routed through the Village as a disguise. Nothing in Rhode Island law purports to authorize or protect such conduct. Further, the instructions given to the jury did not easily *permit* conviction based solely on conflict-of-interest theory; in fact the district court stressed that "[w]hat is wrong and what is unlawful is for a person to make payments to a public official with the intent to cause that official to act in his official capacity in a way that benefits the person making the payments."

Nevertheless, the defendants do point to some indications that the jury could have been confused. They note that the jury was also told that lack of "independent judgment" and "disinterested service" are the evils at which the statute aims to strike; by extrapolation, conflicts of interest might then also be illegal. In addition, the indictment referred to "conflict of interest" and Celona testified that he wrongfully acted while under a conflict of interest.

Given the government's theory of the case and taking the instructions as a whole, *see Woodward*, 149 F.3d at 69, we doubt that the jury convicted based solely on the conflict of interest and without finding bribery for official acts. Certainly, the most obvious basis for conviction was payment for helping to advance or obstruct legislation, and the least obvious was the notion that Celona merely acted under a conflict of interest. However, as we are remanding for a new trial, precautions against any

such possible confusion can easily be taken at the retrial.

Aiding and Abetting Instruction. This brings us finally to the argument, raised by Driscoll alone, that the instructions did not clearly explain the intent requirement of the aiding and abetting charge. This argument was not raised in objections to the instructions; review, therefore, is only for plain error. *United States v. Olano,* 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

In Learned Hand's classic and oft-quoted formulation, to be guilty of aiding and abetting one must "in some sort associate himself with the venture, ... participate in it as in something that he wishes to bring about, ... seek by his action to make it succeed." *United States v. Peoni,* 100 F.2d 401, 402 (2d Cir.1938). The district court in this case instructed that "the Government has to prove that the defendant intended to assist in the commission of the crime or to cause it to be committed." The jury was also told that to be found guilty of aiding and abetting, Driscoll must have "willfully" acted to facilitate the crime; that word had earlier been defined as "knowingly, voluntarily and with an intent to commit the act."

Driscoll now objects that this articulation was too terse, that the instructions should have included the "shared" intent language found in some of our opinions and in the First Circuit Pattern Jury Instructions. *E.g., United States v. Keene,* 341 F.3d 78, 84 (1st Cir.2003) (defendant must have "consciously shared the principal's knowledge").[7] At

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[7] The pattern instructions charge that the government must prove beyond a reasonable doubt "that [defendant] consciously shared the other person's knowledge of the

the very least, she says, Learned Hand's language should have been tracked more closely. Whatever else one might say, the instruction given was assuredly not "plain" error.

There is no single prescribed way to get the aiding and abetting concept across, and what is required might depend on the particulars of the case. For example, if (in the presence of the aider and abettor) the principal said to the victim, "I am going to shoot you" and asked the aider and abettor to hand the principal a gun, fine distinctions may be unnecessary. But suppose the alleged aider and abettor says that he was in the other room when the shooting threat was uttered and had no idea that the gun was about to be used for murder. If the defendant's version is right, an "intent" to hand over the gun would not be enough.

The problem can easily arise in a fraudulent scheme. While not all parts of the puzzle need be known by each defendant, a defendant must have enough knowledge to establish the necessary scienter. "[T]he government could not simply show that [defendants] participated in a transaction that turned out to be part of a fraudulent scheme. The government also had to show [defendants'] 'willful participation in [the] scheme with knowledge of its fraudulent nature and with intent that these illicit objectives be achieved.' " *United States v. Bailey*, 859 F.2d 1265, 1273 (7th Cir.1988) (*quoting United*

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underlying criminal act, intended to help [him/her], and [willfully] took part in the endeavor, seeking to make it succeed." First Circuit Criminal Pattern Jury Instructions § 4.18.02 (1998). The pattern instructions, although often helpful, were not prepared or mandated by this court. *See id.* Preface; *United States v. Tse*, 375 F.3d 148, 157-58 (1st Cir.2004).

States v. Price, 623 F.2d 587, 591 (9th Cir.1980)), *cert. denied,* 488 U.S. 1010, 109 S.Ct. 796, 102 L.Ed.2d 787 (1989).[8]

In all events, counsel is now alert to the issue, and we are confident it can be resolved in the district court in a satisfactory manner. Since the government contends in its brief that there "is no meaningful distinction" between the instruction given and the model charge in the pattern instruction, we assume it will not object on retrial to the use of the pattern charge or comparable language that specifically addresses the issue of knowledge.

The case was ably tried by the district judge, and the instruction as applied to the ambulance runs is an issue that could reasonably be debated. It is frustrating not to be able (yet) to reduce the "honest services" concept to a simple formula specific enough to give clear cut answers to borderline problems. But it is in the nature of sections 1341 and 1346, at least as applied to political activities, that the problems generated sometimes have to be settled one at a time until an accretion of concrete precedents forms a pattern that can be usefully articulated.

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[8] *See also United States v. Bryza,* 522 F.2d 414, 421 (7th Cir.1975) ("Whether or not the defendant had the specific criminal intent to defraud is governed by the conduct and state of mind of the schemer rather than the objects of the scheme."), *cert. denied,* 426 U.S. 912, 96 S.Ct. 2237, 48 L.Ed.2d 837 (1976); *United States v. Pearlstein,* 576 F.2d 531, 537 (3d Cir.1978) ("[D]efendants must either have devised the fraudulent scheme themselves ... or have wilfully participated in it with knowledge of its fraudulent nature.").

The convictions and sentences of the defendants are *vacated* and the matter *remanded* for further proceedings consistent with this decision.

It is so ordered.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 09-1504

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERT A. URCIUOLI,
Defendant, Appellant

JUDGMENT

Entered: July 20, 2010

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Margaret Carter, Clerk

cc: Mr. Weinberg, Ms. Homan, Mr. Lockhart, Mr. Matos, Mr. Donovan & Mr. Neronha